STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Hon. David H. Sawyer, P.J., Hon. Joel P. Hoekstra and Hon. Michael R. Smolenski, JJ.

JAMES JONES,

Plaintiff-Appellee

-vs-

Supreme Court No. 120991
Court of Appeals No. 236835

DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

/

BRIEF ON APPEAL—APPELLEE

ORAL ARGUMENT REQUESTED

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QUESTION PRESENTED

Does the Parole Board lose its ability to revoke a parolee's parole when it does not hold a fact-finding hearing within 45 days pursuant to MCL 791.240a, even if the parolee admitted to these charges before expiration of this time limit?

Yes. Whenever the Parole Board fails to hold a fact-finding hearing regarding parole violation charges within the statutory time limit, *see* MCL 791.240a (45 days), it waives those charges and cannot use them to revoke parole. *Stewart v Dep't of Corrections, Parole Board*, 382 Mich 474, 479, 170 NW2d 16 (1969). This waiver occurs even if the parolee has admitted to the charges before the statutory time limit expires. *Id.* A parolee who does not receive a timely fact-finding hearing is entitled to a writ of habeas corpus to gain immediate release from custody. *In re Lane*, 377 Mich 695, 387 NW2d 912 (1966). The fact that this Court based this remedy on MCL 791.240, the predecessor statute to MCL 791.240a, is of no legal consequence because these statutes are identical in the relevant respects. *Moore v Kenockee* TP, 75 Mich 332, 42 NW 944 (1889). Specifically, they both establish the exact same right to a timely fact-finding hearing. Furthermore, for the past 20 years, the Michigan Courts have been uniformly applying the *Stewart* interpretation of MCL 791.240 to cases arising under MCL 791.240a without controversy.

MATERIAL PROCEEDINGS AND FACTS

On October 2, 1998, Appellee was released on parole. On March 12, 2001 Appellee was charged with three counts of parole violation and taken into custody. Appellee was arraigned on these violations on April 19, 2001. At the arraignment, Appellee was told to respond to each charge against him by either saying "true" or "not true." Appellee responded "true" to two of the charges and "not true" to the third. Appellee did not waive his right to a full fact-finding hearing concerning all three charges. Appellee did not receive his fact-finding hearing until May 16, 2001—a full 66 days after his availability. At this hearing, relying on two of the three charges,[1] the Hearing Officer ordered Appellee to be incarcerated for 18 months before being eligible to be released on parole again. *Jones v Dep't of Corrections*, unpublished per curiam opinion of the Court of Appeals, Docket No. 236835 (Nov. 30, 2001) (Appellant's Appendix, p. 6a).

Appellee filed a writ of habeas corpus in the Court of Appeals. On November 30, 2001, the Court of Appeals held that the Appellant plainly violated MCL 791.240a(1) by failing to provide Appellee with a fact-finding hearing on his parole violation charges within forty-five days of his availability. (Appellant's Appendix at 7a). Following unambiguous Michigan Supreme Court precedent, the Court of Appeals ordered that Appellant immediately release Appellee from custody. (*Id*). After his release, Appellee acquired full-time, stable employment, and enrolled in college-level courses in business administration.

[1] These two charges were for a failure to report and a "dirty" urine sample.

On January 23, 2002, the Court of Appeals denied Appellant's Motion for Rehearing and Motion for Stay. (Appellant's Appendix at 8a). On February 13, 2002, Appellant submitted an identical Motion for Stay to this Court, along with a Leave to Appeal. This Court granted Appellant's Motion for Stay on February 22, 2002. On February 26, 2002, Appellee submitted a Motion for Immediate Reconsideration to this Court regarding the Stay order. Also on February 26, 2002, parole officers arrived at Appellee's home and took him into custody. On October 8, 2002, this Court granted Appellant's application for leave to appeal from the Court of Appeals decision of November 30, 2001. *Jones v Dep't of Corrections*, 467 Mich 884, ___ NW2d ___ (2002). Appellee is currently incarcerated at the Parr Highway Correctional Facility in Adrian, Michigan.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for a writ of habeas corpus is de novo. *French v Jones*, 2002 US App LEXIS 3652 at *1, 9 (6th Cir. March 8, 2002) ("We review a district court's grant of habeas relief *de novo*"); *Federated Publ'ns, Inc v City of Lansing*, 467 Mich 98, 106, 649 NW2d 383 (2002) ("[q]uestions of law are reviewed *de novo*.").

II. THIS CASE PRESENTS NO REASON TO DEPART FROM THE UNAMBIGUOUS REMEDY FOR FAILING TO HOLD A PAROLE VIOLATION FACT-FINDING HEARING WITHIN THE STATUTORY TIME LIMIT

This Court established the remedy for the Parole Board's failure to comply with the statutory time limit for providing a fact-finding hearing almost thirty years ago. Since that time the courts have applied this remedy. This case presents no reason to depart from that remedy or to rethink it.

A. THE REMEDY BY THE COURT IS CLEAR AND WELL-ESTABLISHED

Paroled prisoners have a statutory right to a fact-finding hearing within 45 days of becoming available for return to a correctional facility. MCL 791.240a. Whenever the Parole Board fails to hold a fact-finding hearing regarding parole violation charges within the statutory time limit, it waives those charges and cannot use them to revoke parole. *Stewart v Dep't of Corrections, Parole Board*, 382 Mich 474, 479, 170 NW2d 16 (1969). This waiver occurs even if the parolee has admitted to the charges before the statutory time limit expires. *Id.* A parolee who does not receive a timely fact-finding hearing is entitled to a writ of habeas corpus to gain immediate release from custody. *In re Lane*, 377 Mich 695, 387 NW2d 912 (1966). The *Lane* Court succinctly reversed a Court of Appeals decision holding that a writ of mandamus compelling a hearing was a proper remedy for a tardy hearing. *Id.* The *Lane* Court's reversal was brief because the issue was simple. Because the consequences of a tardy hearing—an inability to find or produce key witnesses, the attrition of crucial evidence, etc—cannot be remedied by a later hearing, and because a tardy hearing does not preserve the parolee's clearly established statutory right to have a fact-finding hearing *within* the statutory time limit, the *Lane* Court rejected mandamus as a proper remedy to protect parolee rights.

This Court has stressed the importance of deference to the Legislature in statutory construction. *Robertson v Daimlerchrysler Corp*, 465 Mich 732, 641 NW2d 567 (2002) (opinion by Markman, J.):

> When reviewing matters of statutory construction, this Court's primary purpose is to discern and give effect to the Legislature's intent. The first criterion in determining intent is the specific language of the statute. *The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed*

> *language is clear*, judicial construction is not permitted and *the statute must be enforced as written.* Additionally, *it is important to ensure that words in a statute not be ignored* . . . . Unless defined in the statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning.

Id at 748 (citations omitted, emphasis added).

Here, the statutory language is clear—a parolee is entitled to a fact-finding hearing within a clear, statutorily defined limit of 45 days. Appellant argues that this Court should find an exception allowing it to ignore this limit when a parolee "admits" to the charges brought before him but there is no such exception. "A fact-finding hearing may be postponed for cause beyond the 45-day time limit on the written request of *the parolee, the parolee's attorney*, or, *if a postponement of the preliminary hearing has been granted* beyond the 10-day time limit, by the parole board," and not in any other case. MCL 791.240a(3) (emphasis added). In this case, none of the events in MCL 791.240a(3) occurred. The Legislature specified for which cases the fact-finding hearing could have been postponed, and declined to provide others when it had the opportunity to do so. This Court, in keeping with the rule of *Robertson*, should defer to the Legislature, and not find an exception to the 45-day time limitation where none was created by it.

B. THE COURT OF APPEALS CORRECTLY APPLIED THIS CLEAR AND WELL-ESTABLISHED PRECEDENT TO APPELLEE'S CASE

The Court of Appeals correctly applied the *Stewart/Lane* remedy to the current case because *Stewart* governs the current case.

The Parole Board brought four parole violation charges against Mr. Stewart when it revoked his parole. *Stewart*, 382 Mich at 476-77. Mr. Stewart admitted to some of those charges. *Id.* After this admission, the Parole Board failed to hold a fact-finding

hearing on these charges within the time frame outlined in the statute. *Id.* This Court held that the parolee's admission of guilt to some of the charges did not affect his statutory right to receive a fact-finding hearing on those charges within the statutory time limit. *Id.* at 478 (a parolee is entitled to a fact-finding hearing within the statutory time-limit where he will have the opportunity to "be heard by counsel and to produce witnesses and proofs in his favor and to meet the witnesses produced against him, without regard to whether he admits his guilt. The statute provides that all such alleged parole violators, not merely those that deny guilt, are entitled to such a hearing").[2]

Appellee's arraignment, at which he merely had the opportunity to answer "true" or "not true" to the charges against him, does not meet the requirements of a fact-finding hearing as defined by MCL 791.240a(2). Appellant concedes this. Appellant's Brief at 1 ("The fact-finding hearing was not held until the 66th day of Plaintiff's availability for return to a state correctional facility"). Appellee finally received a fact-finding hearing on the charges against him a full 21 days after the statutory time limit for holding such a hearing expired. This delay brings Appellee squarely within *Stewart's* reach, and therefore, a habeas writ was appropriate under *Lane*.

[2] The Court of Appeals has applied this rule to MCL 791.240a. *Crawford v Michigan Parole Board*, 35 Mich App 185, 189, n. 4 (1971) ("[T]he fact that the parolee admits the violations as true does not relieve the board of the necessity of a hearing." (citing *Stewart*)).

C. THE REMEDY IS NOT AFFECTED BY THE CHANGES IN THE UNDERLYING STATUTE

The Court of Appeals correctly rejected Appellant's argument that the *Stewart/Lane* remedy does not apply to MCL 791.240a. (Appellant's Appendix at 7a).

While MCL 791.240a repealed MCL 791.240, it re-enacted most of its substantive provisions. Because of this substantial similarity, any remedy or cause of action developed under MCL 791.240 applies with equal force to MCL 791.240a. The *Stewart/Lane* remedy stems from MCL 791.240's statutory time limit for a fact-finding hearing. The original, repealing version of MCL 791.240a contained the exact same statutory time-limit requirement. *Hawkins v Michigan Parole Board*, 45 Mich App 529, 532, 206 NW2d 764 (1972) (quoting MCL 791.240a as it appeared in 1972, shortly after repealing MCL 791.240 in 1968).[3] Because both the repealed and repealing statute contain this same crucial provision at which the *Stewart/Lane* remedy is addressed, that remedy is applicable to 791.240a. *Moore v Kenockee TP*, 75 Mich 332, 334-35, 42 NW 944 (1889) (holding that a judicially created cause of action based on a repealed statute is not destroyed when the repealing statute substantially re-enacts the repealed statute) (internal citations omitted). This principle of statutory construction is legally and pragmatically sound. In the alternative, accepting Appellant's argument would have the effect of undermining authority that interprets a statute whenever that statute is amended or repealed—even if the provisions that the authority interpreted were left unchanged. This result is untenable.

It is true that the Legislature can abrogate a judicial interpretation of a statute. But the accepted procedure for such an abrogation is for the legislature to explicitly

[3] In 1982, the legislature amended this time limit by extending it to the current 45 days. House Legislative Analysis, House Bill 4162, 1-15-82, at p.4 column 2, ¶ 4. (Appellant's Appendix at p 16a).

remove the interpreted provision from the repealing statute, or to explicitly set forth a new provision that, by its very terms, addresses or limits the judicial interpretation. *See Romein v General Motors Corp*, 436 Mich 515, 538, 462 NW2d 555 (1990) (the legislature can properly abrogate judicial interpretations by using express language abolishing the judicial interpretation).[4] In this case, MCL 791.240a contains no provision that could possibly be interpreted as addressing or eliminating the *Stewart/Lane* remedy. It would take an unprecedented extension of the abrogation doctrine to conclude that the mere repeal of 791.240 alone was sufficient to abrogate the *Stewart/Lane* remedy—especially considering the fact that the repealing statute was so substantially similar.

Furthermore, the actual legislative history for MCL 791.240a demonstrates that the legislature fully expected that the *Stewart/Lane* remedy would apply to the new statute. This history provides conclusive evidence that the Legislature did not intend to abrogate the *Stewart/Lane* remedy through repeal of MCL 791.240. In examining MCL 791.240a, the legislature reasoned that increasing the statutory time limit for a fact-finding proceeding from 30 to 45 days would "greatly ease scheduling pressures." House Legislative Analysis, House Bill 4162, 1-15-82, at p.4 column 2, ¶ 4 (Appellant's Appendix at p 16a). Implicit in this recognition of scheduling pressures is an acknowledgement of the continued validity of the *Stewart/Lane* remedy. There would be no scheduling pressures if the *Stewart/Lane* remedy did not apply because the parole board would face no penalty for failing to meet the statutory time limit. The legislature had two clear options for easing this scheduling pressure: it could either extend the

[4] This requirement that the legislature must speak explicitly and unambiguously before courts will determine that it intended to abrogate an existing rule is well-established in other areas of the law. For example, it is well-established that "[t]he legislature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law. Courts should not be left to construction to sustain such bold innovations." *Hosko v Hosko*, 385 Mich 39, 45, 187 NW2d 236 (1971).

statutory time limit, or it could explicitly abrogate the *Stewart/Lane* remedy. In this case, the legislature chose to extend the statutory time limit instead of destroying the *Stewart/Lane* remedy. If the legislature intended MCL 791.240a to destroy the *Stewart/Lane* remedy, it would not have extended the statutory time limit because such a step would have been superfluous for the purpose of easing the scheduling pressure.

Appellant's only argument that the *Stewart/Lane* remedy does not apply to this case relies on *Detroit Trust Co v Allinger*, 271 Mich 600, 610, 261 NW 90 (1935) for the proposition that inchoate rights established by a statute dissolve when the statute they arise under is repealed. But this maxim does nothing to destroy the applicability of the *Stewart/Lane* remedy to a parolee's statutory right to a timely fact-finding hearing.

In *Allinger*, the court examined the effect a repealing statute had on shareholder liability rights established by the repealed statute. *Id* at 614-15. The repealing statute explicitly abrogated these rights. *Id.* The rule derived from *Allinger* therefore, is an obvious one: that rights conferred by a statute are destroyed when a subsequent statute explicitly changes those rights. But the *Allinger* case is at odds to this case because MCL 791.240a confers the same right to a fact-finding hearing to the parolee as MCL 791.240, the statute it repealed. MCL 791.240a ("the prisoner is entitled to a fact-finding hearing"). Furthermore, as discussed above, the *Stewart/Lane* remedy derives from a judicial interpretation of this statutory right. This underlying right appears in both the repealed and the repealing statutes, and therefore the judicial remedy survives the repeal because it is an interpretation or remedy attached to this statutory right. In other words, a judicial interpretation of a statutory provision is not conceptually distinct from that

provision. *See Romein*, 436 Mich at 538 (a judicial interpretation of a statute should be treated as if it were part of that statute as originally written by the legislature).

Finally, various significant Michigan Court of Appeals' decisions support the fact that the *Stewart/Lane* remedy survived the repeal of MCL 791.240. On separate occasions, in both *Crawford v Michigan Parole Board*, 35 Mich App 185, 192 NW2d 358 (1971) and *Feazel v Department of Corrections*, 31 Mich App 425, 188 NW2d 59 (1971), the Court of Appeals held that a parole violator's rights to a hearing, as enumerated by *Stewart*, are not terminated even if his hearing occurred after the repeal of MCL 791.240. Analogously, the *Crawford* Court interpreted other hearing requirements, such as the opportunity to introduce proofs and present witnesses, to survive the repeal of MCL 791.240.[5] Similarly, *In the Matter of Litton*, 30 Mich App 281, 282, 185 NW2d 910 (1971), the Court of Appeals cited *Stewart* in holding that MCL 791.240a "requires that a hearing be conducted within the stated period."

There is no authority interpreting the hearing requirements of MCL 791.240a substantially differently than MCL 791.240. Moreover, the Court of Appeals has held that where a proper revocation hearing was not held within the statutory time limit, the parole violator should be released. *Callison v Department of Corrections*, 56 Mich App 260, 223 NW2d 238 (1974). In this case, it is impossible for a proper revocation hearing to be held since the 45-day period has lapsed. The Court of Appeals, therefore, correctly ordered the writ of habeas corpus and likewise this Court should affirm that order.

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[5] The court in *Crawford* held that these safeguards provided for by MCL 791.240 applied after MCL 791. 240a replaced the former statute even in the absence of administrative rules delineating specific hearing requirements. *Crawford*, 35 Mich App at 189, n. 5. The *Crawford* Court stated that although an administrative regulation enacted subsequent to the hearing in that case did preserve all the safeguards of MCL 791.240, the safeguards still survived the repeal of the statute. *Id.* The *Crawford* Court also cited to *Feazel* to support its holding that the rights contemplated by a hearing under 791.240 remained unchanged after its repeal. *Id.* at 190.

Appellant also argues that MCL 791.240a does not explicitly strip the Parole Board of jurisdiction over the Appellee when the Parole Board violates the statutory time frame for having a fact-finding hearing. But loss of jurisdiction over a parolee is not an issue in this case. Neither the Court of Appeals in this case nor the *Stewart* court addressed the loss of jurisdiction over a parolee. Rather, both decisions concern a waiver of stale claims.

Appellant's repeated mischaracterization of this case as an example of the Parole Board being stripped of jurisdiction is disconcerting. Appellee, who until this point proceeded in this matter pro se, may not have addressed this mischaracterization clearly until now. In making its "jurisdiction" argument, Appellant relies on case law that undercuts its position, and which addresses jurisdiction of the courts and not jurisdiction of administrative agencies. Since MCL 791.240a does not address jurisdiction of administrative agencies, reliance on this line of cases is tenuous at best. The Appellant cites *In re Siggers*, 132 F3d 333 (6th Cir 1997) for the proposition that a statutory time limit need not be complied with if the statute does not explicitly state the penalty for non-compliance. *In re Siggers* (and the other cases in this area that Appellant cites) explicitly holds that courts have the discretion to decide whether to impose a sanction for failure to comply with such a statute. 132 F3d at 336 (holding that a court could decide to grant or deny a motion submitted after expiration of a statutory time-frame). Rather unremarkably, this is exactly what the *Stewart* court did in fashioning a remedy for statutory non-compliance. Furthermore, *In re Siggers* did not concern interpretation of a Michigan statute; in fact, it was specifically interpreting a *federal* statute that is not at all relevant or analogous to the statute under consideration here.

Stewart explicitly states that the Parole Board retains jurisdiction over a parolee when it violates the parolee's statutory right to a timely fact-finding hearing. *Stewart*, 382 Mich at 479. And the Court of Appeals stated as much in this case. *Jones*, at 2 ("the parolee was entitled to be discharged from prison and returned to the jurisdiction of the parole board.") (citing *Stewart*, 382 Mich at 479). Moreover, contrary to Appellant's arguments, the absence of an explicit statutory remedy does not prevent courts from establishing a remedy to ensure protection of a statutory right. *See Stewart*, 382 Mich at 479 (the Parole Board waived its claims against a parolee when it violated his statutory right to a timely fact-finding hearing).

III. FEDERAL DUE PROCESS DOES NOT REQUIRE MICHIGAN TO ABOLISH ITS CLEAR AND WELL-ESTABLISHED REMEDY FOR THE PAROLE BOARD'S FAILURE TO HOLD A TIMELY FACT-FINDING HEARING

Appellant argues that the Federal Due Process requirements for parole revocation outlined in *Morrissey v Brewer*, 408 US 471 (1972) do not require Appellee's release due to the Parole Board's failure to hold a fact-finding hearing within the statutory time period. More specifically, Appellant seems to contend that Due Process does not require Appellee to receive a fact-finding hearing on charges he plead "true" to at the initial arraignment. But these arguments fail because Michigan law governs the procedures for parole revocation proceedings in Michigan.

The *Morrissey* court merely set "the minimum requirements of due process" for parole revocation, *Morrissey*, 408, US at 488-89, and explicitly left State Legislatures and State Courts with the power to define the specific procedures governing parole revocation in their jurisdictions. *Id* at 488 ("We cannot write a code of procedure [for parole revocation]; that is the responsibility of each state. Most States have done so by

legislation, others by judicial decision..."). Michigan has done this and the specific procedures for parole revocations in Michigan are unambiguous. The parolee is entitled to a full fact-finding hearing within 45 days. MCL 791.240a. If the Parole Board does not hold such a hearing within the statutory time limit, it waives its claims, even if the parolee admitted to those charges before expiration of the time limit. *Stewart*, 382 Mich at 479.

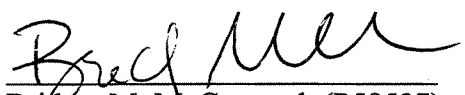
The Michigan Legislature and the Michigan Supreme Court have given parolees more rights than the minimum standards set forth in *Morrissey*. Appellant's analysis of the minimum standards required by *Morrissey* is correct, but it is of limited value since it is not the law or procedure that governs parole revocations in Michigan. It merely represents the floor below which the Michigan Legislature and the Michigan Supreme Court cannot go.

CONCLUSION

For the reasons stated above, Appellee requests that this Court affirm the opinion of the Court of Appeals.

Date: December 20, 2002

Respectfully submitted,



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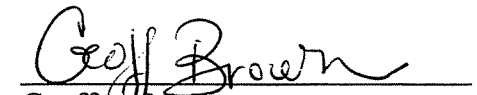

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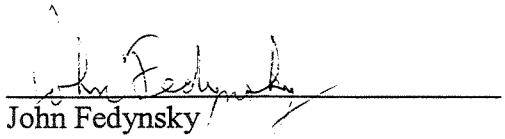

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DEPARTMENT OF CORRECTIONS,

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_____/

PROOF OF SERVICE

On the 23rd day of December 2002, three copies of Plaintiff-Appellee's Brief on Appeal, Oral Argument Requested and Proof of Service was sent by first class mail to:

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